



Data Protection and Digital Information Bill

Briefing on Clause 128 and Schedule 11: Power to Require Information for Social Security Purposes

House of Lords

Committee Stage

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Introduction

1. JUSTICE is a cross-party law reform and human rights organisation working to strengthen the justice system. It is the UK section of the International Commission of Jurists. Our vision is of fair, accessible and efficient legal processes in which the individual's rights are protected and which reflect the country's international reputation for upholding and promoting the rule of law.
2. This briefing is written for the Grand Committee of the House of Lords and addresses JUSTICE's concerns with Clause 128 and Schedule 11 of the Data Protection and Digital Information Bill ("**the Bill**"). JUSTICE has also produced briefings on:
 - a) automated decision-making (Clause 14) and
 - b) national security data protection exemptions (Clauses 28-30)which can be found on our website [here](#).

Summary

3. **In summary JUSTICE considers Clause 128 and Schedule 11 of the Bill to be unlawful, lacking in evidence, and to undermine the rule of law. The provisions:**
 - a) **disproportionately infringe the right to privacy of benefits recipients;**
 - b) **are not supported by a publicly available equality impact assessment to evaluate any discriminatory impact of the provisions;**
 - c) **subject benefits recipients to arbitrarily broad state surveillance powers compared to their fellow citizens, irrespective of any wrongdoing; and**
 - d) **were introduced late in the legislative process, depriving those who will be affected by the provisions and the organisations who represent their interests from giving evidence to the Public Bill Committee and undermining the legislative process.**
4. **JUSTICE urges Peers to oppose Clause 128 and Schedule 11 stand part of the Bill.**
5. Below, JUSTICE analyses the provisions in three respects:
 - a) infringement of the right to privacy;
 - b) risk of indirect discrimination; and
 - c) undermining of the rule of law.

Clause 128

6. Clause 128 amends Part 1 of the Social Security Administration Act 1992. In doing so it creates a new power for the Secretary of State to give an “*account information notice*” to third parties such as banks, building societies, and transmission companies. These notices mandate that the third party provide information to the Secretary of State about accounts they hold and the individuals who hold them. The accounts must be linked to the receipt of benefits; this means the accounts into which benefits have been or will be paid, and any other accounts the person has (including joint accounts and appointee accounts)..
7. The Secretary of State does not need to meet any threshold of reasonable suspicion to issue a notice.
8. The stated purpose of the power is to assist the Secretary of State in:

“identifying cases which merit further consideration to establish whether relevant benefits are being paid or have been paid in accordance with the enactments and rules of law relating to those benefits”¹.

The Right to Privacy

9. Article 8 of the European Convention of Human Rights (“**ECHR**”) is engaged by these powers since they provide for state interference with individuals’ private financial data.² To be compliant with human rights law, the power would have to be in accordance with the law and necessary in a democratic society to achieve one of the legitimate aims set out in article 8(2), including being a proportionate means of achieving the aim. .
10. The Department for Work and Pensions (“**DWP**”) has argued that the power is compliant with human rights law:

“We believe this measure is necessary and proportionate to protect taxpayers’ money and prevent crime. We recognise we must balance this with people’s right to privacy and we will therefore ensure the power is appropriate and no

¹ Schedule 11 of the Bill providing and inserting Section 1 (2) of Schedule 3B into Part 1 of the Social Security Administration Act 1992.

² Information retrieved from an individual’s banking documents constitutes personal data, whether it is sensitive private information on information on the data subject’s professional dealings. The copying of banking data and the subsequent storage by the authorities of such data, acts which fall under the notion of both “private life” and “correspondence”, amount to interference for the purposes of Article 8 (*M.N. and Others v. San Marino*, App no. 28005/12 7 July 2015, § 51-55).

*more than necessary to address the problem. This will be achieved through the design of the power and ensuring the right checks are in place”.*³

11. While JUSTICE acknowledges that combatting benefit fraud and error are both legitimate aims,⁴ proportionality requires considering whether less intrusive measures could be adopted without unacceptably compromising the objective, and whether a fair balance has been struck between the rights of the individual and the interests of the community.⁵ For the following reasons, JUSTICE is not persuaded by the DWP’s analysis that the measures are proportionate.

Excessive breadth of the powers

12. The powers are remarkably broad. Even non-means tested benefit recipients are included in the scope, including state pension holders, meaning the provisions could affect over 20 million people.⁶

13. However, according to the government’s own analysis, if the powers work as estimated, they are expected to generate approximately £250 million in net annual revenue. This amount is less than 3% of the estimated annual loss to fraud and error.⁷ JUSTICE therefore is concerned that the infringement on the privacy of millions of individuals is disproportionate to the benefit to be gained by the community, even if taken at its highest estimation.

Other less intrusive measures are available: requiring reasonable suspicion

14. There is no legal requirement that the Secretary of State have a reasonable suspicion or any other “reasonable grounds” to suspect fraud or error in order to exercise the power. Indeed, existing legislation already permits the DWP to request information from third parties, such as banks, on an individual basis where there is an existing suspicion of welfare fraud.⁸ Instead, the power is a carte blanche surveillance power..

15. Thresholds and tests, often requiring “reasonable suspicion” or “reasonable grounds” are commonplace legal requirements for good reason: they provide a safeguard to the privacy

³ DWP, *‘Fighting Fraud in the Welfare System’*, Policy Paper May 2022 at §42.

⁴ Both “the economic well-being of the country” and “the prevention of...crime” are listed aims in Article 8(2) ECHR.

⁵ *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39 Lord Reed at §74.

⁶ At any one time, DWP is making benefit and pension payments to over 20 million people. National Audit Office, *Department for Work & Pensions: Departmental Overview 2022–23* (December 2023) p4.

⁷ DWP, *Third Party Data Gathering Impact Assessment (IA)* (September 2023) pp1-3.

⁸ DWP, *Fighting Fraud in the Welfare System*, Policy Paper May 2022 at §40.

of the individual against the arbitrary exercise of state power. For example, a police officer cannot arrest anyone without reason; the officer must have “reasonable grounds for suspecting” an individual is/ is about to commit an offence.⁹ Similarly, if seeking to arrest someone under suspicion, a police officer cannot simply enter a private dwelling without a warrant unless he has “reasonable grounds” for believing that the person is present.¹⁰

16. JUSTICE agrees with the Constitution Committee’s concern about “*the breadth of these provisions, which empower the Government to demand access to individual bank accounts without grounds for suspicion*”. JUSTICE further notes the Committee’s recommendation that the power “*should be limited to circumstances in which the Secretary of State has reasonable grounds for inquiry*.”¹¹

17. The government appears to acknowledge these concerns:

We are confident that the power is proportionate and would operate in a way that it only brings in data on DWP claimants, and specifically those claimants where there is a reasonable suspicion that something is wrong within their claim.”¹²

18. If a threshold of “reasonable suspicion” is the measure that secures proportionality, JUSTICE considers that should be reflected in the legislation itself.

Other less intrusive measures are available to tackle benefit errors

19. The DWP has referenced a 2017 Proof of Concept scheme, in which the bank used risk-matching criteria to identify 549 accounts of benefit claimants to review.¹³ A minority - 30% - required remedial action, arising out of both fraud and error. The “*majority of these outcomes were a correction of the benefit payment, with a small number of prosecutions and administrative penalties*”.¹⁴ No further detail was provided as to the statistics of identified fraud alone.

20. It can be inferred that the majority of remedial action was due to error, not fraud. While reducing errors is a legitimate aim, surveillance of individuals’ private bank accounts is one of the most intrusive ways to tackle such errors. Less intrusive measures include improving the procedure for benefits claimants, providing claimants with free independent advice

⁹ Section 24 Police and Criminal Evidence Act 1984

¹⁰ Section 17 Police and Criminal Evidence Act 1984

¹¹ Select Committee on the Constitution, ‘[Data Protection and Digital Information Bill](#)’, 2nd Report of Session 2023-2024, HL Paper 53 at §18.

¹² DWP, [Third Party Data Gathering Impact Assessment \(IA\)](#) (September 2023) §122.

¹³ DWP, ‘[Fighting Fraud in the Welfare System](#)’, Policy Paper May 2022 at p.12.

¹⁴ Ibid.

about their entitlements, or indeed improving DWP decision-making so errors do not occur in the first place. JUSTICE has, jointly with the Administrative Justice Council (“**AJC**”), previously expressed concern at the high error rate of DWP decision-making.¹⁵ For example, with respect to Personal Independence Payments, the appeal tribunal is still overturning a staggering 70% of DWP decisions appealed.¹⁶

21. JUSTICE therefore concludes that the powers are a disproportionate interference with individuals’ right to privacy.

Risk of discrimination

22. The financial surveillance power in the provisions will only apply to benefit recipients. The potential inequality created by only targeting this population is highlighted by Lord Sikka’s amendment 219, which seeks to apply the provisions to all those in receipt of public funds, not just those in receipt of benefits.

23. With respect to the Equality Act 2010, the most obvious concern is that the population of benefits recipients may disproportionately include people with disabilities, a protected characteristic in the Equality Act 2010,¹⁷ however of course other protected characteristics may also be relevant, such as age, sex and ethnicity.

24. The DWP’s Impact Assessment acknowledges as a “*Key [...] sensitivity*” that “*The Third-Party Data measure can potentially include vulnerable people, these areas will be explored further in the equality impact assessment.*”¹⁸

25. However, the government has failed to publish this equality impact assessment. JUSTICE is therefore extremely concerned that insufficient analysis has been undertaken to understand whether the provisions will discriminate against those with protected characteristics under the Equality Act 2010 - the proactive consideration of which is required by the Public Sector Equality Duty.¹⁹ If this analysis has been undertaken, JUSTICE is further concerned that it is not publicly available for Parliament and wider society to scrutinise.

¹⁵ JUSTICE and AJC, [Reforming Benefits Decision-Making](#) (2021)

¹⁶ Ministry of Justice, [Tribunal Statistics Quarterly: Oct to Dec 2023](#) (2024)

¹⁷ Section 6 of the Equality Act 2010, listing disability as a protected characteristic.

¹⁸ DWP, [Third Party Data Gathering Impact Assessment \(IA\)](#) (September 2023) p4.

¹⁹ Section 149 of the Equality Act 2010.

26. A key issue in assessing the discrimination of any DWP policies or practices has long been the DWP's failure to systematically collect data of those receiving benefits. In our 2021 report, *Reforming Benefits Decision-Making*,²⁰ JUSTICE and the AJC joined the National Audit Office,²¹ Social Security Advisory Committee²² and the Work and Pensions Select Committee²³ in calling for the DWP to improve its data collection and evaluation. Our report specifically highlighted the need for data on protected characteristics.
27. If those with protected characteristics will be put at a particular disadvantage by the powers when compared with persons without those characteristics, this will amount to indirect discrimination. The only way this can be lawful is if the discrimination is justified by being a proportionate means of achieving a legitimate aim.²⁴
28. For all the reasons discussed above in relation to the proportionality of the privacy infringement, JUSTICE considers any discrimination is unlikely to be able to be justified.
29. **JUSTICE submits that there is real risk of discrimination resulting from these powers. However, the information available is woefully inadequate for Parliament to scrutinise the provisions.**

The Rule of Law

30. Finally, with respect to the extent to which the provisions uphold the rule of law, JUSTICE has concluded that the provisions i) lack sufficient constraint to the arbitrary exercise of state power; ii) run contrary to good lawmaking; and iii) have been introduced in a way which undermines legislative scrutiny.

Arbitrary exercise of state power

31. A fundamental benchmark of the rule of law is the protection of the individual from the arbitrary exercise of State power.²⁵ As JUSTICE explained in its recent report on the rule of law, this protection requires that:

²⁰ JUSTICE and AJC, *Reforming Benefits Decision-Making* (2021) p42.

²¹ National Audit Office, *Supporting disabled people to work* (HC 1991, 2019) §25; National Audit Office, *Universal Credit: getting to first payment* (HC 376, 2020) §26.

²² Social Security Advisory Committee, *The effectiveness of the claimant commitment in Universal Credit: Occasional Paper 21* (2019) p34 (Recommendation 4).

²³ Work and Pensions Committee, *Benefits Sanctions*, 19th Report of Session 2017-2019 (2018) §52.

²⁴ Section 19(2)(d) Equality Act 2010.

²⁵ Venice Commission of the Council of Europe, *'The Rule of Law Checklist'*, (2016), p.29-30.

*There should be legal safeguards in place to prevent “arbitrary” use and “abuse of power” by public authorities. The scope for discretion in public decision-making should, therefore, be circumscribed and clearly delineated. Where a public authority makes a decision that impinges on the rights of individuals, it should give reasons for such a decision. Remedies should be available where the discretionary use of power is abused.*²⁶

32. This power falls short of this benchmark, in being uncircumscribed and giving the executive carte blanche surveillance powers with no need to have or provide reasons.
33. What’s more, the DWP intends to use machine learning to prioritise which claims to review for potential fraud.²⁷ In our briefing on Clause 14 of the Bill,²⁸ JUSTICE raised concerns about the more permissive regime in this Bill, which removes the right not to be subject to automated decision-making including profiling.²⁹ As a result, DWP will be able to make far more use of automated decisions without human involvement. JUSTICE considers this exacerbates the risk of arbitrariness. The harmful impact of overreliance on algorithms to identify suspicion in this context can be seen the Netherlands SyRI scandal, which saw thousands unlawfully pursued having been incorrectly flagged by a benefit fraud-detecting algorithm.³⁰
34. When the DWP Permanent Secretary, Peter Schofield, was questioned by the Commons Work and Pensions Committee on whether there were “*shades of Horizon*” over his department’s use of such technology, he simply replied “*I really hope not*”³¹.
35. Of course, mere aspiration in preventing future miscarriages of justices is clearly insufficient. JUSTICE considers the intended use of automation to identify those worthy of investigation for fraud exacerbates concern that the powers will be used arbitrarily, and

²⁶ JUSTICE, [The State We’re In: Addressing Threats & Challenges to the Rule of Law](#) (September 2023), §1.19.

²⁷ DWP, ‘[Annual Report and Accounts 2022-23](#)’, p102.

²⁸ Available on our website [here](#).

²⁹ Unless the data involved is special category data, i.e. sensitive data which reveals racial or ethnic origin, political opinions, religious or philosophical beliefs; trade-union membership; genetic data, biometric data processed solely to identify a human being; health-related data; data concerning a person’s sex life or sexual orientation.

³⁰ See *NJCM et al. v The Dutch State* (2020) The Hague District Court ECLI: NL: RBDHA:2020:1878 (SyRI). English translation available at <https://uitspraken.rechtspraak.nl/details?id=ECLI:NL:RBDHA:2020:1878>.

³¹ Work and Pensions Committee, ‘[Oral evidence: DWP’s Annual Report and Accounts 2022-23](#)’, HC 417, 10 January 2024 at Q23.

makes the absence of a legally required threshold of “reasonable suspicion” even more troubling.

Contrary to good lawmaking

36. The Government seemingly recognises the risk of arbitrariness and abuse, by seeking to reassure that the policy adopted by those exercising the power will be one of minimal intrusion and restraint: “*only a minimum amount of data will be accessed and only in instances which show a potential risk of fraud and error*”.³²

37. JUSTICE considers this is the wrong approach. Invasive state powers should be drafted narrowly to restrict the potential for arbitrariness and abuse; they should not be drawn broadly, to leave to the discretion of the executive the proportionate and therefore lawful exercise of the power. Indeed, to do so leaves the door wide open for future holders of those executive offices to easily exercise powers arbitrarily.

Undermining legislative scrutiny

38. Finally, we echo concerns by Constitution Committee regarding the inadequate procedure followed by the Government in introducing Clause 128 and Schedule 11 at Report stage in the House of Commons.³³ Parliamentary scrutiny is a key requirement of good lawmaking: it provides pivotal checks and balances on the executive’s legislative agenda and affords an extra layer of review to ensure the quality of law is maintained.³⁴ It is of note that the Government has not justified its fast-tracking of such a controversial power.

39. As explained by former Treasury Solicitor and Permanent Secretary of the Government Legal Department, Sir Jonathan Jones KCB KC:

“[p]olicy developed at speed and finalised at the last minute [...] will tend to be worse policy – less well thought through, more inconsistent, more prone to unintended gaps and anomalies”³⁵.

40. Critically, the late tabling of this provisions also precluded key stakeholders, such as people with disabilities and organisations representing them and their rights, freedoms and

³² UK Department for Science, Innovation & Technology, Department for Work & Pensions, and the Home Office, [‘Changes to data protection laws to unlock post-Brexit opportunity’](#) (updated 24 November 2023).

³³ Select Committee on the Constitution, 2nd Report of Session 2023-2024, [‘Data Protection and Digital Information Bill’](#), HL Paper 53 at §17.

³⁴ Select Committee on the Constitution, [‘COVID-19 and the use and scrutiny of emergency powers’](#) (2021), p7.

³⁵ J. Jones KCB KC, [‘Remarks to the Statute Law Society \(edited\) The Rule of Law and Subordinate Legislation’](#), (UCL, 2021), p. 4.

interests, from giving evidence on how this power will affect them. Depriving those individuals and organisations from being considered weakens the rule of law by undermining the legitimacy and scrutiny of the legislative process.³⁶

Conclusion

41. In summary JUSTICE considers Clause 128 and Schedule 11 of the Bill to be unlawful, lacking in evidence, and to undermine the rule of law.
42. **Therefore JUSTICE urges Peers to oppose Clause 128 and Schedule 11 stand part of the Bill, and we support the notice given to do so by Baroness Kidron, Lord Anderson of Ipswich, Baroness Chakrabarti, Lord Clement-Jones (Clause 128) and Lord Kamall (Schedule 11).**
43. Notwithstanding our primary position to oppose the Clauses outright, in the alternative we support amendment 220-235 in the name of Baroness Sherlock which place limits on the exercise of the power. Collectively, these amendments would:
 - a) Introduce a suspicion threshold;
 - b) Narrow the use of the information to determining whether benefits have been paid lawfully, rather than other “departmental functions”;
 - c) Require the Secretary of State to issue a code of practice in connection with the use of account information notices, rather than such a code being optional;
 - d) Require a draft code of conduct be approved with specified consultees;³⁷
 - e) Require revisions to the code of practice be approved by a resolution of both Houses, whilst retaining the Secretary of State’s ability to withdraw the code;
 - f) Insert a new provision for annual reporting to Parliament on the use of account information notices;³⁸
 - g) Remove pensions from the scope of the Bill; and
 - h) Require affirmative procedure regulations specifying the working-age benefits within scope of the Bill.

³⁶ JUSTICE, '[The State We're In: Addressing Threats & Challenges to the Rule of Law](#)', September 2023 at §2.53.

³⁷ To include the Social Security Advisory Committee and organisations that would have to comply with account information notices.

³⁸ To include information on statistical use and the Secretary of State’s views as to the proportionality and effectiveness of notices.